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No. 39

In the

Supreme Court of the United States

OCTOBER TERM, 1967

HANK AVERY,

Petitioner,

v.

MIDLAND COUNTY, TEXAS, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Texas

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

OPINIONS BELOW

The opinions of the Supreme Court of Texas are reported at 406 S.W. 2d 422. They appear in the Record from pages 141 through 159. Certain findings of the trial court are referred to and made a part of the decision of the Texas Supreme Court. This constitutes the relevant record of the proceedings in the Texas courts which is before this Court.

QUESTION PRESENTED

The question presented is whether there necessarily will be an invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution if the Commissioners Precincts of Midland County, Texas are not redistricted solely upon the basis of population.

The Federal *question is limited to whether there necessarily* will be an "invidious discrimination" against Petitioner if the Commissioners precincts of Midland County, Texas are redistricted for "the convenience of the people" upon consideration of population and such additional factors as number of qualified voters, land areas, geography, and miles of county roads and taxable values, as already ordered by the Supreme Court of Texas.

The Federal posture of the case is thus limited.

The question is not that posed by Petitioner, whether the Fourteenth Amendment's Equal Protection Clause permits the continuation of the practice of the Commissioners Court of Midland County to divide the county into precincts so grossly disproportionate in population that less than five per cent of the county's total population elects a majority of the members of the Commissioners Court. That question has been settled by the Texas Supreme Court.

The question is not that posed by Petitioner, whether the principle of "one man—one vote," claimed to have been

enunciated in *Reynolds v. Sims*,[1] is applicable to the election by precinct of the members of the governing body of Midland County, Texas. The issue here joined between the real parties to this cause concerns only the division into precincts of Midland County, Texas by the Commissioners Court pursuant to the remand and directions of the Texas Supreme Court.

The question to be decided should not properly be that submitted by the United States as amicus curiae, whether the equal population principle enunciated in *Reynolds v. Sims* and other cases involving State legislative apportionment is applicable as well to the district-based election of members of the governing bodies of local units of government. The issue here for decision is whether Petitioner has yet made any showing of "invidious discrimination" by reason of remand of the case to the Texas trial court for division of the county for convenience of all the people upon consideration of *all* relevant factors, including population.

STATEMENT

The facts of this case may not be simple but they are clear.[2] They are fixed and settled between the parties to this cause by the opinions of the Texas Supreme Court and those findings of the Trial Court included therein (R. 141-159). They are correctly stated *in part* in the Statement of Petitioner (Pet. Br. 3-6) and the Statement of the *amicus* (U.S. Br. 3-16).

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[1] *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

[2] "The facts in this case are simple and clear," says Petitioner (Pet. Br. 5).

1. Article V, Section 18 of the Texas Constitution requires a division of the counties of Texas "from time to time, for the convenience of the people * * * into four commissioners' precincts in each of which there shall be elected by the qualified voters thereof one county commissioner * * *." (R. 141).

2. Midland County was last redistricted by order of its Commissioners Court of August 31, 1963, effective January 1, 1964. The Texas courts have recognized Petitioner as a resident property owning, tax paying citizen authorized to attack the division and to seek a redistricting of the county (R. 144).

3. At all relevant times, Midland County, Texas had a population of approximately 70,000 persons. In excess of 95% of the population resided in Commissioner's Precinct No. 1, and the remaining population of the county was disbuted among the other three precincts. Ninety-seven percent of the qualified voters of the county resided in Commissioner's Precinct No. 1 and the remaining qualified voters were distributed among the other precincts. And at all relevant times other pertinent factors, such as roads, land area and taxable values of the county, were grossly disproportionate among the Commissioners Precincts of the county (R. 142).

4. At all relevant times the county could have been divided into Commissioners Precincts on a basis or plan taking into proper account population, number of qualified voters,

land area, taxable values and other pertinent factors which would have been practical and for the convenience of the people (R. 142).

These facts are argued in some detail by Petitioner and the *amicus*. These facts refer to Petitioner's complaint of rural domination of the Commissioners Court, and are irrelevant here since such domination has been effectively ended by the decision of the Supreme Court of Texas. It is more important to recite and remember tthe other facts and local law stated by the Texas Supreme Court.

(1) Midland County is a subordinate and derivative branch of the government of Texas (R. 145).

(2) The county's legislative functions are negligible (R. 145).

(3) The terms "convenient" and "convenience of the people" appearing in Article V, Section 18 of the Texas Constitution, give the Commissioners Court "some discretion to meet the 'changing needs of the people' but such must be 'exercised in good faith and without fraud, not arbitrarily, nor in gross abuse of discretion'" (R. 148).

(4) The very fact of population concentration in the city will enable the city voters to elect the county-wide officers (R. 149).

(5) The voice of the citizens of the rural areas will be lost for all practical purposes if the Commissioners Precincts of the county are apportioned solely on a population basis (R. 149).

(6) Important affairs of the county administered by the Commissioners Court—such as roads, bridges, taxable values of large lands areas—disproportionately concern the rural areas (R. 149).

(7) Developments during the years have greatly narrowed the scope of the functions of the Commissioners Court and limited its major responsibilities to the non-urban areas of the county, that is, the city government is the major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers (R. 149).

(8) There was arbitrariness in the districting order of Midland County, Texas of August 31, 1963 because of the malapportionment of the Commissioners Precincts, and the precincts can and must be redistricted to eliminate such discrimination (R. 150).

That the order of the Commissioners Court of Midland County, Texas of August 31, 1963 is grossly disproportionate in population as claimed by Petitioner and found by the Texas Supreme Court and emphasized by the *amicus* is no longer an issue between the parties to this cause. That issue has been decided by the Texas Supreme Court.

There can be no finding by this Court that the plan afforded by the Texas Constitution and implemented by the judgment of the Texas Supreme Court reflects "no policy, but simply arbitrary and capricious action or inaction." For here there is a decision by the Texas Supreme Court which

promises to assure fair representation and vote to all persons and all segments of the state's society, with proper consideration of the whole population.

ARGUMENT

I *The Judgment of the Supreme Court of Texas*

The judiciary of the State of Texas has taken jurisdiction of this cause to require a valid redistricting of Midland County, Texas. The Supreme Court of the state has recognized the requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as well as the requirements of the equal rights or equal protection clause of Article I, Section 3 of the Texas Constitution. The Texas court has ordered that Midland County be redistricted in conformity with both the Constitution of the United States and the Constitution of the State of Texas, with a rational variance from strict equality in population in the Commissioners Precints if justified by additional factors relevant in consideration of the particular function performed by the various local governmental bodies.

In *Scott v. Germano*, 381 U.S. 407, 85 S. Ct. 1525 (1965), involving apportionment of the Illinois Senate the Court stayed the hand of the lower courts, and declared:

> "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."

In *The Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 84 S. Ct. 1429 (1964), involving the apportionment of seats in the Maryland Senate, this Court said:

> "We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes."[3]

The Texas Supreme Court has found no invidious discrimination by reason of division of the Texas counties into commissioners precincts for convenience of the people upon consideration of various factors peculiarly relevant thereto. The Texas court has concluded that the Federal Constitution's Equal Protection Clause does not require in *all* cases a division of the counties *solely* upon a population basis. If this conclusion be correct, *as argued by Respondents*, then the action heretofore taken by the judiciary of Texas is to be encouraged by dismissal of these proceedings or denial of the petition for writ of certiorari, and, in any event, affirmance of the State court's judgment.

II *The Commissioners Courts of Texas*

In Texas the county is a body corporate and politic, a political subdivision, a subordinate and derivative branch of State government (Pet. Br. 7; Tex. S. Ct. op. R. 145).[4]

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[3] Also see *Scranton v. Dew*, 379 U.S. 40, 85 S. Ct. 207, 13 L. Ed. 2d 107 (1964), citing *Butcher v. Bloom*, 415 Pa. 438, 203 A. 2d 556 (1964); *Jackman v. Bodine*, 43 N.J. 453, 473, 205 A. 2d 713, 724 (1964). See also *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W. 2d 40 (1956), and discussion thereof in *Baker v. Carr*, 369 U.S. 186, 235-236, 82 S. Ct. 691, 719-720, 7 L. Ed. 2d 663 (1962).

[4] Also see *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178, 28 S. Ct. 40, 52 L. Ed. 151 (1907); *Reynolds v. Sims*, 377 U.S. 533, 575, 84 S. Ct. 1362, 1388, 12 L. Ed. 2d 506 (1964).

The constitutional and statutory jurisdiction and authority of the Commissioners Courts of the Texas counties is historical. They have enjoyed a constitutional status for more than one hundred years. Constitution 1866, Article IV, Section 17, 3 Vernon's Texas Constitution 613; Constitution 1869, Article V, Sections 19, 20 and 21, 3 Vernon's Texas Constitution 659; Constitution 1876, Article V, Section 1 and 18, 2 Vernon's Texas Constitution 3.

Under each of these Texas Constitutions, the Commissioners Court is provided for as a party of the judicial machinery of the State. In each of such Constitutions Article I consists of a Bill of Rights. Article II declares in each instance that the powers of Government are to be divided into three distinct departments: namely, legislative, executive and judicial. In each instance the three succeeding Articles provide for the officers and bodies who are to exercise the legislative, executive and judicial functions, respectively. The provisions concerning the Commissioners Court in the Constitution of 1866 are found in "Article IV Judicial Department." The provisions concerning the Commissioners Court in the Constitution of 1869 are found in "Article V Judicial Department." The provisions concerning the Commissioners Court in the Constitution of 1876 are found in "Article V Judicial Department." It is clear that the framers of the Texas Constitutions during the last one hundred years have conceived of the Commissioners Courts of the several counties as an integral part of the Judicial Department of State Government.

The classification of the Commissioners Courts as a part of the machinery of the Judicial Department of the State is carried out by the scheme of organization of the Texas Revised Civil Statutes, 1925, as amended. It will be noted that the basic provisions for the organization and functions of Commissioners Courts are contained in Title 44, Texas Revised Civil Statutes, Articles 2339, et seq. It is significant that Title 44 is contained in the following sequence of Titles of the Revised Civil Statutes, to wit:

Title 37 Court—Supreme
Title 38 Courts of Criminal Appeals
Title 39 Courts of Civil Appeals
Title 40 Courts—District
Title 41 Courts—County
Title 42 Courts—Practice in District and County
Title 43 Courts—Juvenile
Title 44 Courts—Commissioners
Title 45 Courts—Justice

Further, the courts of Texas have, through a long line of decisions, held that the Commissioners Court is a court, though there is conflict as to whether the court is one of general jurisdiction or af special and limited jurisdiction with only specially delegated powers.[5]

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[5] *Haverbekken v. Coryell County*, 112 Tex. 422, 247 S.W. 1086 (1923); *Black Bros. v. State*, 253 S.W. 576 (Tex. Civ. App. 1923), re'd on another point, 116 Tex. 615, 297 S.W. 213 (1927); *Gaines v. Newbrough*, 12 Tex. Civ. App. 466, 34 S.W. 1048 (1896); *Miller v. Brown*, 216 S.W. 452 (Tex. Civ. App. 1919); *Von Rosenberg v. Lovett*, 173 S.W. 508 (Tex. Civ. App. 1915); *Williams v. Castleman*, 112 Tex. 193, 247 S.W. 263 (1922).

The Texas Commissioners Court has various functions as a court:

1. By statute it has regular terms at fixed times at designated places;

2. Its finding and orders are, with few exceptions, accorded finality;

3. It has power to issue all notices, citations, writs and process as may be necessary for the proper execution of its powers and duties;

4. It has power to punish contempts by fines;

5. The commissioners are not liable civilly for any act done by them as such when the tribunal has color of jurisdiction; and

6. If the body has jurisdiction of the matter, then the lack of merit of the claims and want of proper form does not impair its jurisdiction and authority to pass upon the claims and allow or reject them.

The Texas Supreme Court has said in this cause that the appellation "court" is a misnomer in the accepted meaning of the designation (R. 145). Strictly speaking this is correct because, although it is created and labeled as a court in the Texas Constitution and in many of the Texas statutes, many of its functions are administrative. This is pointed up in the Argument of Petitioner and the various Texas statutes copied in the Appendix to Petitioner's Brief (Pet. Br. 8-11, Appendix 6-41).

As shown in Petitioner's Brief and the statutes appended thereto, the Texas Commissioners Court has the authority to adopt a budget for all county expenditures and to set the salaries of all county officials, to make purchases for the county and to lease or sell the county's property, to settle the debts of the county, to own and operate the county's courthouses, jails, auditoriums, hospitals, libraries, airports, cemeteries and garbage dumps. The Commissioners Court of Texas is to prepare the annual budget and levy taxes for general county purposes. As a practical matter this is the same authority recognized in the County Board of Education of Michigan in *Sailors v. Board of Education of County of Kent*, 386 U.S. ...., 87 S. Ct. 1549, 1553 (1967), where it was pointed out by this Court that the authority of the county board included the appointment of a county school superintendent, "*preparation of an annual budget and levy of taxes*," "distribution of delinquent taxes," employment of teachers, and establishment of a school for children in juvenile homes. And yet there, the Court declared:

> "We need not decide at the present time whether a State may constitute a local legislative body through the appointive rather than the elective process. We reserve that question for other cases such as Moody v. Flowers (Board of Supervisors v. Bianchi), 386 U.S. ....., 87 S. Ct. 1544, which we have disposed of on jurisdictional grounds. We do not have that question here, *as the County Board of Education performs essentially administrative functions; and while they are important, they are not legislative in the classical sense.*"

In consideration of the similar authority of the Commissioners Courts and persumably on much the same reasoning, in this case the Texas Supreme Court has found and declared as a matter of local law and fact:

> "The primary function of the commissioners court is the administration of the business affairs of the county * * *. Its legislative functions are negligible * * *."

We argue, therefore, that the Texas Commissioners Court is a judicial and administrative body. Its functions are essentially judicial and administrative. It can not be properly classified as a legislative governmental unit.

III *Reynolds v. Sims*—One Man, One Vote

It may be admitted — over stifled objection — that the Fourteenth Amendment applies to the State and to every governmental agency or instrumentality of the State which exercises power delegated to it by the State. It may be admitted — without qualification — that the county is a governmental instrumentality or division of the State and the Commissioners Court is the administrative body of the county, which exercises powers delegated to it by the State. However, it does not follow that the State may exercise its powers only in a body apportioned on a population basis. Merely because State legislators must be elected on a basis of equal apportionment is not meant that their agents must be chosen on the same basis.

We would start with the opinion of the Court in *Sailors v. Board of Education of County of Kent*, 386 U.S. ...., 87 S. Ct. 1549, 1551 (1967), in which the Court itself started with *Reynolds v. Sims:*

> "We start with what we said in Reynolds v. Sims, supra, at 575, 84 S. Ct. at 1388:
>
> > " 'Political subdivisions of States—counties, cities or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 U.S. 161, 178, 28 S. Ct. 40, 52 L. Ed. 151, these governmental units are "created as convenient agencies for exercising such of the governmental powers of the state, as may be entrusted to them," and the "number, nature and duration of the powers conferred upon (them) * * * and the territory over which they shall be exercised rests in the absolute discretion of the state." ' "
>
> "A State cannot of course manipulate its political subdivisions as so to defeat a federally protected right, as for example, by realigning political subdivisions so as to deny a person his vote because of race * * *. Yet as stated in Anderson v. Dunn, 6 Wheat. 204, 226, 5 L. Ed. 242:
>
> > " 'The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion applied to the exigencies of the state as they arise. It is the science of experiment.' "

To state the true test — and not merely repeat by rote the one man, one vote argument—we continue with *Dusch v. Davis*, 386 U.S. ...., 87 S. Ct. 1554, 1556 (1967):

> "But on the assumption that Reynolds v. Sims controls, *the constitutional test under the Equal Protection Clause is whether there is an 'invidious' discrimination.* 377 U.S., at 561, 84 S. Ct. at 1381."[8]
>
> "The Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megapolis in relation to the city, the suburbia, and the rural countryside. Finding no invidious discrimination we conclude that the judgment of the Court of Appeals must be and is reversed."

The Equal Protection Clause is not an algebraic formula. Equal protection does not rest on whether each and every man has one vote. The question is not whether the practice assailed "results in some inequality" but rather on whether "any state of facts reasonably can be conceived that would sustain it." In other words, one who attacks the practice must show "that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S. Ct. 337, 340, 55 L. Ed. 369 (1911); *Lucas v. Forty-fourth General Assembly of Colorado*, 377 U.S. 713, 743, 84 S. Ct. 1459, 1477 (1964).

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[8] "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson v. Lee Optical*, 348 U.S. 483, 489, 75 S. Ct. 461, 465, 99 L. Ed. 563 (1955).

"* * * the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan v. State of Maryland*, 366 U.S. 420, 81 S. Ct. 1101 (1961).

Both prior and subsequent to *Baker v. Carr*[7] and *Reynolds v. Sims*,[8] the Court has refused to review State court decisions upholding "rational" methods of districting for municipal bodies, even when it was argued that the voting power of citizens in one district was diluted because another district with a substantially smaller population could elect the same number of representatives to the local governing board.

Despite the strenuous efforts of Petitioner and the United States to explain them away, the rulings of this Court on the petitions for Writ of Certiorari in *Tedesco v. Board of Supervisors*, 339 U.S. 940, 70 S. Ct. 797 (1950), and *Glass v. Hancock County Election Commission*, 378 U.S. 558, 84 S. Ct. 1910 (1964) are clear and definitive rulings to the effect that the Fourteenth Amendment does not require equality of population as between precincts, districts or other subdivisions for the election of officials for local governmental subdivisions.

In *Tedesco v. Board of Supervisors*, the plaintiffs protested the population disparity in the New Orleans City Council election district and claimed that this disparity deprived them of their Fourteenth Amendment rights. The Louisiana court held that, since the right to vote for municipal officers was granted by the State, the State could regulate that right in any "rational" manner. Thus, the question was pointedly raised and expressly overruled by

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[7] *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962).

[8] *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

the Louisiana Supreme Court in its opinion, reported at 43 So. 2d 514, 517. The constitutional question was submitted to this Court, and ruled on in the notation dismissing the appeal as follows:

> "PER CURIAM. The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question."

It appears to us that the authorities on which the *Tedesco* appeal was dismissed were *Soliah v. Heskin*, 222 U.S. 522, 32 S. Ct. 103 (1912); *Board of Laramie v. Board of Albany*, 92 U.S. 307, 23 L. Ed. 552; *Mobile County v. Kimbell*, 102 U.S. 691, 26 L. Ed. 238; *Hunter v. City of Pittsburgh*, 207 U.S. 161, 28 S. Ct. 40 (1907); *Higginbotham v. Baton Rouge*, 306 U.S. 535, 59 S. Ct. 705 (1939); *Minor v. Happerset*, 21 Wall 162, 22 L. Ed. 627; *Mason v. Missouri*, 179 U.S. 328, 21 S. Ct. 125 (1900); and *Breedlove v. Settles*, 302 U.S. 277, 58 S. Ct. 205 (1937). The principle of these cases is that, in the Federal system, the states have absolute control over their political subdivisions and municipal corporations and the officials who serve them. Without any compulsion from the Federal government and under no constitutional restraints, the states may create as many or as few subdivisions and municipal corporations as they please, or whatever size or shape. The states may abolish or merge them at will, provide for the selection of their officials by appointment, election, or in any other manner, or abolish the offices altogether.

We argue that there is quite a difference in the duties and responsibilities which the States owes to its citizens under the restrictions of the Fourteenth Amendment as

pertain to legislative officials, and those which it owes as pertaining to *local* judicial and *administrative officials.* While the State is required by the Fourteenth Amendment to accord equal treatment to its citizens by giving each an equal voice in the selection of the legislators who make the laws which govern the people, the cases above cited hold that the State is under no constitutional obligation to see to it that the counties and cities created by it are equal in size or shape, or that the officials of those counties and cities are equally or proportionately distributed, or that the districts or precincts within those counties or cities are equal in area, population, or any other regard. The requirement that the State distribute its legislators equally among the people just does not and should not apply to its judicial and admininstrative agents and officials.

The Court did not overrule the *Tedesco* case in 1962 in *Baker v. Carr.* Writing for the court, Mr. Justice Brennan apparently thought that the Court had dismissed the *Tedesco* case because the appeal presented no colorable claim, since the Louisiana court had been right in testing the New Orleans districting by its standard of rationality.[9]

In *Glass v. Hancock County Election Commission,* subsequent to *Baker v. Carr,* there was involved a disproportion between districts for election of county supervisors. Presented was a question whether this population disparity and the consequent disproportion in voting strength was such an invidious discrimination as violated the requirements of

[9] *Reapportionment,* 79 Harvard L. Rev. 1228, 1272; U.S. Br. 66.

the Fourteenth Amendment. Again this Court dismissed the appeal (denied certiorari) because there was no substantial federal question presented.

There is reason for refusing to impose the so-called one man, one vote rule upon the counties and other municipal governments. There is properly concern as to the nature and powers of the bodies involved. There is wisdom in suggesting a distinction in the application of the equal-population principle depending upon a proper classification of the functions performed by the governmental body and its effect upon persons who are not similarily situated and do not stand in the same relation to the governmental action in question. Undoubtedly this is one of the grounds of the decision of the Texas Supreme Court — that the Texas Commissioners Courts do not take actions which importantly affect the residents of the City of Midland.

With its unchallenged knowledge of the local Texas situation, the Texas court has found that the voice of the rural areas will be lost for all practical purposes if the commissioners precincts are apportioned solely on a population basis, and yet, important affairs of the county — such as roads, bridges, taxable values of large land areas, etc. — disproportionately concern the rural areas (Texas S. Ct. op., R. 149). As found by the Texas Supreme Court, "* * * developments during the years have greatly narrowed the scope of the functions of the commissioners court and limited its major responsibilities to the nonurban areas of the county. It has come to pass that the city government with its legislative, executive and judicial branches, is the

major concern of the city dwellers and the administration of the affairs of the county is the major concern of the rural dwellers" (R. 149).

In this connection the following paragraph is taken from the brief which the United States filed in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (U.S. Br. 29-30):

> " 'Due recognition of geographic and other minority interests is also a comprehensible reason for reducing the weight of votes in great cities. If seventy percent of a State's population lived in a single city and the remainder was scattered over wide country areas and small towns, it might be reasonable to give the city voters somewhat smaller representation than that to which they would be entitled by strictly numerical apportionment in order to reduce the danger of total neglect of the needs and wishes of rural areas.' "[10]

While the Court in *Reynolds v. Sims* rejected the consideration of factors other than population in apportionment of state legislators, the reasons for doing so in the State cases are not convincing here. State governments number fifty. Their powers and problems are similar — taxation, education, public roads, hospitals, conservation of natural resources, etc. Local governments including the Texas counties, on the other hand, present the broadest imaginable spectrum. Their governing bodies number in the tens of thousands and differ widely in powers and responsibilities. They include counties such as Midland County, Texas and cities, townships, metropolitan governments, school districts, hospital districts and planning commissions. They include governmental units of both limited and broad

[10] *Lucas v. Forty-fourth General Assembly of Colorado*, 377 U.S. 713, 759, 84 S. Ct. 1459, 1486.

judicial, executive and administrative or even legislative powers. And units of the same name may have different functions from state to state. For example, apparently in Virginia a county exercises substantially all governmental powers except for maintenance of roads, while in Texas a county has very limited powers and, as a practical matter, only those administrative and judicial. We do not advocate that the courts discard population as one of the factors to be considered. We simply say that the Equal Protection Clause as applied to local governing bodies should be interpreted to require no more than a rational system responsive to local conditions. The straightjacket which Petitioner (and, in part, the United States) seeks to impose by an automatic and exclusive application of the population-equality rule would be wholly intolerable.

One of the better arguments recognizing the important need for an element of discretion in the manner in which local governments may be required to confrom to the one man, one vote principle appears in the opinion of the Supreme Court of New York in *Town of Greenburgh v. Board of Supervisors*, 157 N.Y. Law J. No. 29, p. 18 (February 3, 1967), where it was said:

> "Plans which provide for reapportionment of county legislative bodies will necessarily deal with varying conditions in different counties. Each should be judged in the light of its own provisions as they deal with local conditions, and as they affect the citizen's right to fair and effective representation in the legislative body. What may be impermissible with respect to state legislative reapportionment plans may be permissible in county plans, and what may be permissible in one

county may be unacceptable in another (cf. *Reynolds v. Sims*, supra, 377 U.S. 533, 578, *Swann v. Adams*, supra). The equal protection clauses do not require the application of rigid rules in all cases of legislative apportionment, if varying circumstances justify a departure from them, in particular cases, or classes of cases. There are obvious differences between state legislative bodies and county boards of supervisors which justify a different approach to county reapportionment problems than that which has been approved, so far with respect to state plans * * *.

"The prohibition of the equal protection clauses goes no further than the invidious discrimination (cf. *Williamson v. Lee Optical Co.*, supra, 348 U.S. 483, 489), and a legislative apportionment plan which seeks to preserve a separate voice in legislative processes, to the small, as well as the large communities if it can be effected without such discrimination, neither violates that prohibition, nor is it because of that purpose, irrational or unreasonable * * *"

Population is, of course, an important factor in the division of any school district, city, county or state. However, population must at times and to some degree be subordinated in devising an apportionment plan which is to achieve the important goal of ensuing a fair, effective and balanced representation of the regional, social and economic interests within a county. What constitutes a rational plan reasonably designed to achieve this objective will vary from county to county and from state to state, since so many of the counties and states are unique, in terms of geography, distribution of industry and population, and variety of social and economic interests. So long as the state's constitutional and statutory law and the apportionment of the county or other municipality reasonably achieves effective and bal-

anced representation of all substantial interests, without sacrificing the principle of effective majority rule, that plan can not be considered irrational and should not be held to involve invidious discrimination.

There is another serious problem facing the Court if it here takes charge and orders a different redistricting of Midland County, Texas. Reapportionment of Midland County, Texas and other county and municipal governmental units will involve problems of a scale not encountered and hardly imagined before. The years of reapportionment litigation involving state legislatures since *Reynolds v. Sims* has been accompanied by many and varied unusual stresses on the judicial-legislative relations. At least this process appears to now have some foreseeable end. Once the fifty states are apportioned in accordance with the rules set by this Court, the role of the courts should be limited to adjudicating occasional disputes in the States. However, the 1962 census of governments found that 91,186 governmental units exercises state-delegated powers in the United States. Even if reapportionment were to be limited to general-function units, approximately 3,043 counties, 18,000 cities, towns and villages, and 17,142 townships meet the qualifications of general-function units.[11]

Among other problems which would arise in setting standards for local reapportionment solely on a population basis is that the decennial census, which provides roughly adequate figures for congressional and state districting, may be badly out of date for purposes of county and municipal

[11] *Reapportionment*, 79 Harv. L. Rev. 1228, 1274, et seq.

apportionment. Housing developments, urban renewal demolitions, construction of airports and related industrial areas, or even the building of a highway may drastically alter the distribution of population among the smaller voting districts within a very short time. The desire for stability and continuity in government makes this kind of continuous reapportionment impractical. The judicial entry into this realm of thousands and thousands of cases would be profoundly ill-advised.

What the State of Texas has done by its Constitution and its statutory laws—and the judgment of the Texas Supreme Court—is to adopt a plan of county apportionment which is designed in a rational way to insure that minority voices be heard. This plan and assumption of responsibility by the Texas courts should not be here defeated.

IV *Amicus Curiae Brief of the United States*

In its amicus curiae brief, the United States has stated its position to "assert the public interest—and that of millions of American citizens—in fair representation at the local government level" (U.S. Br. 3). Respondents are likewise interested in the public interest, and especially in fair representation of all the county's citizens at the local Commissioners Court level. Respondents are primarily interested in this their particular suit and the place of their court in the judicial machinery of their county, state and country. They are willing to and will abide by the decision of the Supreme Court of Texas. They recognize their burden if

the judgment of the Texas court be affirmed, and if permitted to do so they will undertake fair and constitutional apportionment.

As the Government's brief says, the petition on which Petitioner went to trial in the District Court of Midland County, Texas alleged that factors, other than population, such as land area and assessed valuation of property were irrelevant and "were grossly disproportionate among the four precincts" (R. 9-10). The United States says that it does not discuss these other factors at length "since the overriding constitutional consideration * * * is whether the prescribed districts are substantially equal in population, although equal distribution of such other factors may of course be both desirable and equitable" (U.S. Br. 10). It is, of course, proper to call this Court's attention to the fact that these other factors are relevant and may be both desirable and equitable. In fact, this is the argument of Respondents.

In its brief the *amicus* has stated that, "Although the trial court made no explicit reference to the Equal Protection Clause of the Federal Constitution, it clearly appears that its holding was based on Federal as well as State constitutional ground" (U.S. Br. 13). This is a correct statement of the bases of the holding of the Texas courts.

It is said in the brief, as if to support other argument, that, "the Texas Supreme Court plainly concluded that the federal Constitution's Equal Protection Clause does 'not require a commissioner's precinct division of Texas counties' solely upon a population basis 'in all cases.'" (U.S. Br. 15).

There are here *three* most important words or clauses, to wit: that the Federal Constitution does not *require* the reapportionment *solely* upon a population basis *in all cases.* There are many Texas counties of different population, size and social and economic interests. No fixed and final rule of law should be fostered upon those counties requiring them in all cases, regardless of those differences, to apportion the counties solely upon a population basis with no consideration of local individuality.

The Texas court has not only considered the population factor but it has also considered and authorized the Commissioners Court to consider other relevant factors to achieve effective and balanced representation of all of the substantial interests within the county. This is not at all to say, as has the United States, that "the opinion of the Supreme Court is a clear statement that the equal-population principle does not apply to a Texas county's governing body" (U.S. Br. 22). This is to say only that in deciding apportionment of Texas counties, the equal-population principle does not control all counties in all cases.

The United States says in its brief that, "To be sure, the Court included in its *Sailors* opinion a quotation from *Reynolds* relating to the non-sovereign status of political subdivisions which several courts have referred to in support of a determination that the equal-population principle is inapplicable at the local level * * *. That language is plainly explicable by the context in which it appears * * * and was, in our view, included in the *Sailors* opinion in connection with the accepted proposition that a State 'has vast leeway

in the management of its internal affairs' " (U.S. Br. 29-31). Respondents have no argument with this statement.

In the brief it is said, "In the concluding paragraph of the *Dusch* opinion, the Court stated that the 7-4 plan 'seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside' " (U.S. Br. 34). This Court did make this statement. It is presumed that the statement was made for a purpose, and the purpose was to make clear that *in some cases* the plan or apportionment may quite properly include and reflect a relaxing of the relations or comparisons between equality of votes in the urban and rural communities to reserve the proper balance between the "modern megalopolis" and the rural countryside.

The *amicus* admits with some candor that, "Certain of the language in this Court's opinion in the *Sailors* case * * * might possibly be read as suggesting a distinction as to the applicability of the equal-population principle depending upon a classification of the functions performed by various local governmental bodies" (U.S. Br. 41). Respondents do so read that language in the Court's opinion in the *Sailors* case. Respondents believe that this reading of that language is not only reasonable but is required.

From the government's brief, it appears that there was questioning at the oral argument of the *Moody*, *Bianchi*, *Sailors* and *Dusch* cases, indicating a concern as to the nature and powers of the governmental bodies involved in

those cases (U.S. Br. 41). Undoubtedly this concern was genuine, and for this reason Respondents have attempted to discuss the nature and powers of the Commissioners Courts of Texas, as explained in the opinions of the Supreme Court of Texas. Certainly this Court can better look at those opinions of the Texas court to find and learn the nature and powers of the Texas Commissioners Court than from reading the argumentative briefs of either of the parties to this cause or the amicus curiae brief of the United States.

The most persuasive arguments of the United States appear in the latter part of its brief. Respondents here refer to and quote these *reasonable* statements of policy:

> "Implicit in this traditional view in Equal Protection Clause litigation is the converse notion that, where persons are not similarly situated and do not stand in the same relation to the governmental action in question, different treatment is permissible and classifications are valid so long as they are rationally related to the purposes of the legislation and take properly into account the differences in how the persons are situated" (U.S. Br. 52).

> "Where a governmental body's actions do not touch or involve citizens generally, but only a discrete and identifiable part of the citizenry in a significant way, then a districting plan which rationally takes this consideration into account may comport with the requirements of the Equal Protection Clause, even though this entails substantial deviations from a population basis. Such a plan might allow only certain persons to elect the members of such a body, might weight the votes of those directly affected by that body's actions more heavily than others, or might simply arrange

the districts so that effect would be given to the fact that the body acts in a way which primarily affects only certain citizens" (U.S. Br. 53).

"In other words, since Reynolds assumes that all citizens are similarly situated *vis-a-vis* the body whose members are to be elected, where the contrary can be shown and where a districting plan is rationally and intentionally grounded on such a consideration, deviations from the equal-population principle may be permissible" (U.S. Br. 54).

"It might be suggested that the same sort of approach should be regarded as applicable to at least some general-function units as well. Indeed, in the instant case the Texas Supreme Court pointed out that the county board functions mainly in the rural areas of the county, while many of the governmental functions relating to the city residents are handled by the city council" (U.S. Br. 55).

"In light of these considerations, it has been asserted that 'when governmental functions are divided between two bodies in the same geographical area—county and city—the recognition of such elements as the differing stake of urban and rural citizens may be relevant'" (U.S. Br. 66).

"Note, *Reapportionment*, 79 Harv. L. Rev. 1228, 1227 (1966), which further notes 'the different degrees of political responsibility a county board may have to its urban and rural constituents' *(ibid.)*. See also *Hanlon v. Towey*, 142 N.W. 2d 741, 747 (Minn.), and Note, 11 S. Dak. L. Rev. 386, 395 (1966)" (U.S. Br. 66).

"This result (requiring districting based solely on population) may appear a harsh one in the instant case because the sparsity of population in the rural areas could well result in depriving those who live there of any effective voice if population-based districting is required" (U.S. Br. 69).

> "Of course, nothing prevents those living in rural areas from seeking election to the county board from whatever revised districts are prescribed, and it is doubtful that the city dwellers would complain greatly if the rural areas were given one seat on the body, although this would not be in strict accord with the equal-population principle, since then, at least, the rural areas would not have majority control of the board" (U.S. Br. 69).

We would conclude with the statement made by the United States that, "Indeed, if there were a practical way of assessing and reflecting the somewhat greater interest of the rural inhabitants in the actions of a county governing board, it would not seem improper to do so." (U.S. Br. 67). The Texas Supreme Court had declared that, indeed, there is a practical way of redistricting Midland County, Texas to reflect the interests of all of the inhabitants of the county without dividing the county solely on a population basis. In the words of the United States *amicus*, it would not seem improper to so require apportionment.

CONCLUSION

There has been no showing of discrimination—invidious or otherwise—against Petitioner or any other person by the judgment of the Supreme Court of Texas *unless* this Court is to now assert its jurisdiction and hold *as a matter of law* that *in all cases* there must be apportionment of sub-state governmental units *solely* on a population basis. The Texas Supreme Court has held as a matter of fact that there was discrimination in the lowest court—the Commissioners Court—as found by the Texas District Court. The case has

been reversed and remanded to the lower Texas courts to eliminate this condition. *Unless* this Court is to now abandon its past consideration of the complex problems of county and city government and pronounce the absolute and inviolate rule that all such governmental agencies of the State must be divided on an equal population basis, the judgment of the Texas Supreme Court should be affirmed.

Wherefore, we urge the Court to affirm the decision and judgment of the Supreme Court of Texas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the within and foregoing Brief has been served on Petitioner, by depositing copies of the same in the United States mail, postage prepaid, addressed to:

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Copies of this brief have also been mailed to the United States as Amicus Curiae, by depositing copies of the same in the United States mail, postage prepaid, addressed to:

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Dated this .... day of October, 1967.

F. H. Pannill